Bina Jati Sdn Bhd v Globe Engineering Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1129 OF 2010
ZALEHA ZAHARI, ZAINUN ALI AND CLEMENT SKINNER JJCA
13 DECEMBER 2012

Contract — Building contract — Subcontract — Claim for payment for work done under subcontract — Construction of terms of subcontract — Whether actual receipt of payment by main contractor was condition precedent to appellant's obligation to make payment to respondent subcontractor

Sum Projects (Brothers) Sdn Bhd ('Sum Projects') appointed Bina Jati Sdn Bhd ('the appellant') as the main contractor of a project for the construction of a hotel block in Port Dickson, Negeri Sembilan (the project). The appellant then appointed Globe Engineering Sdn Bhd (the respondent) as a subcontractor in respect of the fire protection services of the project. The appellant and respondent executed a subcontract. Clause 11 (b) of the subcontract, which dealt with the mode of payment for work in progress, provided that the appellant as main contractor was to pay the respondent payment for work in progress within 14 days of receipt of the architect's certificate. The appellant terminated the main contract with Sum Projects by reason of the latter's failure to pay the sums due to it. At the same time the appellant notified the respondent of the said termination. In response the respondent notified the appellant that the total value of the works executed by it upon termination was RM807,011.75, subject to the approval of the architect. The appellant disputed the respondent's claim and argued that its liability to pay the respondent had not arisen as it had not received payment from Sum Projects. The respondent then instituted proceedings against the appellant for its progress claim entitlement in the architect's interim certificate amounting to RM460,394.49. The judicial commissioner found that the actual receipt of payment by the appellant from Sum Projects was not a condition precedent to the appellant's liability to make payment to the respondent. The High Court thus allowed the respondent's claim. This was the appellant's appeal against that decision on the grounds that the JC had erred in construing paragraph 14 of the letter of award and cl 11(b) in the subcontract by imposing upon the appellant a liability to pay the respondent when the appellant had not received payment from Sum Projects. The appellant submitted that the JC had also erred in his reliance on the Court of Appeal's decision in *Antah Schindler Sdn Bhd v Sangyong* ('the Antah Schindler case') in the light of the later decision of the Court of Appeal in *Asiapools (M) Sdn Bhd v IJM* ('the Asiapools case'), which had taken a contrary view and held that the subcontractor was not entitled to any progress payment unless the same had been received by the main

contractor. The respondent maintained that even if Sum Projects did not pay the appellant, the respondent was entitled to be paid the whole of the works it had executed if there was to be an automatic discharge of the subcontract through no fault of its own.

Held, allowing the appeal with costs of RM2,500:

(1) The clause to be considered in the present case was a 'pay when paid' clause that referred to payment on a 'back to back basis'. The two Court of Appeal decisions relied upon by the parties had taken a conflicting position when construing the meaning of this clause. However, this court was in agreement with the later decision of the Court of Appeal in the *Asiapools* case (see para 28).

(2) As the clauses relied upon were clear and unambiguous, it was the duty of the court to give effect to the clear intention of the parties as expressed in cl 11(b) of the subcontract. The words used in cl 11 (b) made it clear that there was a condition precedent to be fulfilled before the appellant's liability to pay arose, ie payment from Sum Projects was a condition precedent to the appellant's obligation to make payment to the respondent subcontractor (see para 29).

[Bahasa Malaysia summary

Sum Projects (Brothers) Sdn Bhd ('Sum Projects') melantik Bina Jati Sdn Bhd ('perayu') sebagai kontraktor utama untuk projek pembinaan satu blok hotel di Port Dickson, Negeri Sembilan ('projek'). Perayu kemudiannya melantik Globe Engineering Sdn Bhd ('responden') sebagai subkontraktor bagi perkhidmatan perlindungan kebakaran untuk projek tersebut. Perayu dan responden memeterai satu subkontrak. Klausa 11 (b) subkontrak, mengenai cara pembayaran untuk kerja yang sedang dijalankan memperuntukkan bahawa perayu sebagai kontraktor utama perlu membayar responden bayaran untuk kerja yang sedang dijalankan dalam tempoh 14 hari penerimaan sijil arkitek. Perayu membatalkan kontrak utama dengan Sum Projects atas alasan kegagalan Sum Projects untuk membayar jumlah terhutang kepada mereka. Pada masa yang sama perayu memaklumkan responden mengenai pembatalan tersebut. Sebagai balasan, responden memaklumkan perayu bahawa nilai keseluruhan kerja-kerja yang dijalankan olehnya selepas pembatalan ialah RM807,011.75, tertakluk kepada kelulusan arkitek. Perayu mempertikaikan tuntutan responden dan menghujah bahawa liabilitinya untuk membayar responden tidak timbul memandangkan perayu belum lagi menerima bayaran daripada Sum Projects. Responden kemudiannya memulakan prosiding terhadap perayu untuk hak tuntutan berperingkatnya dalam sijil interim arkitek yang berjumlah RM460,394.49. Pesuruhjaya kehakiman mendapati bahawa penerimaan bayaran sebenar oleh perayu daripada Sum Projects bukan merupakan satu syarat terdahulu kepada liabiliti perayu untuk membuat bayaran kepada responden. Mahkamah Tinggi dengan itu membenarkan

tuntutan responden. Ini merupakan rayuan perayu terhadap keputusan tersebut atas alasan-alsan bahawa PK terkhilaf dalam mentafsirkan perenggan 14 surat award dan klausa 11(b) dalam subkontrak yang mengenakan ke atas perayu satu liabiliti untuk membayar responden apabila perayu tidak menerima bayaran daripada Sum Projects. Perayu menghujah bahawa PK juga terkhilaf dalam pergantungannya ke atas keputusan Mahkamah Rayuan dalam *Antah Schindler Sdn Bhd v Sangyong* ('kes Antah Schindler') dan merujuk kepada keputusan akhir Mahkamah Rayuan dalam *Asiapools (M) Sdn Bhd v IJM* ('kes Asiapools'), yang mengambil pandangan bertentangan dan memutuskan bahawa subkontraktor tidak berhak untuk sebarang bayaran berperingkat melainkan bayaran tersebut telah diterima oleh kontraktor utama. Responden menegaskan bahawa walaupun sekiranya Sum Projects tidak membayar perayu, responden berhak untuk dibayar untuk keseluruhan kerja-kerja yang dijalankan olehnya sekiranya terdapat satu pelepasan automatik subkontrak melalui bukan salahnya sendiri.

Diputuskan, membenarkan rayuan dengan kos RM2,500:

(1) Klausa yang perlu dipertimbangkan dalam kes ini ialah satu klausa 'bayar apabila dibayar' yang merujuk kepada bayaran berdasarkan 'back to back basis'. Keputusan-keputusan dua Mahkamah Rayuan yang disandarkan oleh pihak-pihak telah mengakibatkan satu kedudukan bercanggahan apabila mentafsirkan maksud klausa ini. Walau bagaimanapun, mahkamah ini bersetuju dengan keputusan akhir Mahkamah Rayuan di dalam kes *Asiapools* (lihat perenggan 28).

(2) Memandangkan klausa-klausa yang disandarkan adalah jelas dan tidak kabur, adalah merupakan kewajipan mahkamah untuk memberi kesan kepada niat jelas pihak-pihak seperti yang dinyatakan dalam klausa 11(b) subkontrak. Perkataan-perkataan yang digunakan dalam klausa 11 (b) menjadikannya jelas bahawa terdapat satu syarat terdahulu yang perlu dipenuhi sebelum liabiliti perayu untuk membayar timbul, iaitu bayaran daripada Sum Projects merupakan satu syarat terdahulu kepada kewajipan perayu untuk membuat bayaran kepada sub kontraktor responden (lihat perenggan 29).]

Notes

For cases on subcontract, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3458–3462.

Cases referred to

Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd [2008] 3 MLJ 204; [2008] 3 CLJ 641, CA (refd)

Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd [2010] 3 MLJ 7, CA (folld)

Appeal from: Suit No D-22–936 of 2003 (High Court, Kuala Lumpur)

BE Teh (Teh & Associates) for the appellant.
BK Goh (BK Goh & Goh) for the respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] This is an appeal by the defendant, Globe Engineering Sdn Bhd, against the decision of the Kuala Lumpur High Court dated 31 March 2010 in allowing the plaintiff's (the respondent in this appeal) claim against the defendant (the appellant in this appeal).

BACKGROUND

[2] The background facts are as follows: The defendant was appointed as the main contractor of a project known as 'Cadangan Pembangunan (1) Blok Hotel & Pangsapuri Hotel 13 Tingkat dengan Kemudahan Kolam Renang, Gimnasium, Restoran, Kedai Bilik Mesyuarat & Daerah Perhimpunan di atas Lot 110 & 879, Jalan Rumah Rehat, Daerah Port Dickson, Negeri Sembilan' ('the project'). The owner of the project, (ie the employer) was Sum Projects (Brothers) Sdn Bhd (subsequently referred to as 'Sum projects').

[3] Clause 27(a)(vii) of the main contract of the defendant with Sum-Projects provides that the defendant would make payment to the nominated subcontractor of the amount certified as due in the architect's certificate within 14 days upon receipt of the said certificate.

[4] The defendant appointed the plaintiff as a subcontractor in respect of the fire protection services of the project vide letter of award dated 3 August 1996. The value of the subcontract works awarded to the plaintiff was RM862,000 inclusive of the contingency sum of RM30,000. Paragraph 14 of this letter of award states as follows:

> Payments - back to back basis. Within seven (7) days upon receiving from the Client, 'Sum projects (Brothers) Sdn Bhd'.

[5] The plaintiff and the defendant also executed a subcontract ('the subcontract'). Under cl 11(a) of the subcontract the defendant was to apply to the architect for certificates of payment and for inclusion therein the amount representing the total value of the subcontract works, including authorised variation. When the defendant receives a progress claim from the plaintiff to be included in the overall claim to Sum Projects, the defendant would apply for a certificate of payment. This certificate of payment is the 'interim certificate'

referred to in cl 30 of the main contract. The period of honoring certificates as provided in the appendix was 30 days from the date of the architect's certificate for payment.

[6] Clauses 11(b) and 19 of the subcontract provides as follows:

> 11(b) Within seven (7) days of the receipt by the Contractor from the Employer of the amounts included under on Architect's Certificate for which the Contractor has made an application under Clause 11(a), the Contractor shall notify and pay to the Sub-Contractor the total value certified therein in respect of any amounts ascertained … less: i) Retention money, that is to say the proportion attributable to the Sub-Contract Works of the amount retained by the Employer in accordance with the Main Contract …; and ii) The amounts previously paid.
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> …
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> 19. If for any reason the Contractor's employment under the Main Contract is determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then, the employment of the Sub-Contract under this Sub-Contract shall thereupon also be determined and the Sub-Contractor shall be entitled to be paid:
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> (i) the value of the Sub-Contract Works completed at the date of such determination, such value to be calculated according to Clause 10 of the Sub-Contract;
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> (ii) the value of work begun and executed but not completed at the date of such determination, such value to be calculated according to Clause 10 of this Sub-Contract;
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> (iii) the value of any unfixed materials and goods delivered upon the site for use in the Sub-Contract Works the property has passed to the Employer under the terms of the Main Contract;
>
> (iv) the cost of materials or goods properly ordered for the Sub-Contract Works for which the Sub-Contractor shall have paid or of which he is legally bound to accept delivery. On such payment by the Contractor any materials or goods so paid shall become the property of the Contractor;
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> (v) any reasonable cost for removal from the site of his temporary buildings, plant, machinery, appliances and goods and materials.

[7] What led to the dispute in this case between the plaintiff and the defendant was this. Vide letter dated 17 March 1998 the defendant informed the plaintiff that they had, on 10 March 1998, issued a notice to Sum Projects terminating the main contract by reason of Sum Projects failure to pay the sums due to them. The plaintiff was requested to furnish its final claim as at 10 March 1998.

[8] The plaintiff responded vide letter dated 13 April 1998 informing the defendant that its final claim was RM807,011.75, subject to approval of the consultant/architect.

[9] The plaintiffs then instituted proceedings against the defendant for the balance of the progress payments amounting to RM460,394.49 based on the value of the subcontract works in the Architect's Certificate of Payment No 19, which certificate valued the subcontract works at RM794,441.13 less payments made by the defendant to the plaintiff.

[10] The defendant disputed the plaintiff's claim. Reliance was placed on para 14 of the letter of award and cl 11(b) of the subcontract. The defendant contended that the defendant's liability to pay the plaintiff has not arisen as the defendant itself had not received payment from Sum Projects.

THE DECISION OF THE HIGH COURT

[11] The learned judicial commissioner rejected the defendant's argument that the plaintiff was entitled to payment only when Sum projects paid the defendant. The judicial commissioner's interpretation of the clauses referred to her was that the plaintiffs entitlement to be paid upon termination of the sub-contract was not dependent on the defendant's receipt of payment from Sum Projects based on the Court of Appeal's decision in *Antah Schindler Sdn Bhd v Ssangyong Engineering & Construction Co Ltd* [2008] 3 MLJ 204; [2008] 3 CLJ 641. In *Antah Schindler*, which also contained a cl 11(b) in that subcontract (which is in pari materia with the provisions in this case) the contractor was to notify and pay the subcontractor within 14 days of receipt of the architect's certificate. In that case the Court of Appeal's reading of the similarly worded cl 11(b) was that it merely fixes a time for payment of the amounts specified in the architect's certificate. The court held that there was no express provision mounted into the clause which imposed a restriction over the rights of the plaintiff to pursue its claim against the defendant such that the plaintiff would not be paid if the defendant was not paid.

[12] The learned judicial commissioner held that the actual receipt of payment by the defendant from Sum -Projects was not a condition precedent to the defendant's liability to make payment to the plaintiff of its progress claim entitlement in the architect's interim certificate. She ruled that para 14 and cl 11(b) were not 'if' clauses but rather 'when' clauses.

[13] The learned judicial commissioner then ruled that the retention sum of RM32,325 was not to be deducted from the sum owing to the plaintiff by the defendant by reason of it being unjust to do so.

[14] As to the claim of indemnity by the defendant against the plaintiff and the multiple suits filed at the Seremban High Court by the defendant against Sum Projects, and Sum Project's counterclaim against the defendants, the learned judicial commissioner's finding was that there was no basis for the counterclaim. She ruled that the costs of employing another contractor to complete the subcontract works, and damages for the delay in completing the subcontract works, were directly occasioned by the defendant's unilateral determination of the main contract, and consequently, the subcontract.

[15] For these reasons the learned judicial commissioner allowed the plaintiff's claim and dismissed the defendant's counterclaim.

THE APPELLANT COUNSEL'S SUBMISSIONS

[16] The appellant's counsel submitted that the learned judicial commissioner erred in construing para 14 of the letter of award and cl 11(b) in the subcontract by imposing upon the defendant (main contractor) a liability to pay the plaintiff (subcontractor) when the defendant had not received payment from Sum Projects (employer).

[17] Counsel for the appellant urged this court to give effect to the intention of parties in this case which according to him was clear and unambiguous. He argued that the words used in the 'back to back' clause or the 'pay when paid' clause should be given their plain and ordinary meaning and must be construed to mean that the plaintiff (as subcontractor) was to be paid only when the defendant (main contractor) received payment from Sum Projects under the main contract.

[18] On the judicial commissioner's reliance on the Court of Appeal's decision in *Antah Schindler*, our attention was drawn to a later decision of the Court of Appeal, *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd* [2010] 3 MLJ 7, which had taken a contrary position from *Antah Schindler*. In *Asiapools*, the Court of Appeal had surveyed the law on the 'pay when paid' clause in Hongkong, Singapore and Malaysia. The Hongkong Court in considering a 'pay when paid' provision in what is known as the 'Green Form' (which was similarly worded as cl 11(b) of the subcontract in this case) the word 'receipt' in the said clause was construed to mean 'actual payment, receipt of money'. The plaintiff (subcontractor) in *Asiapools*' was held not to be entitled to any progress payment unless the same had been received by the defendant (main contractor) from the employer. He accordingly urged us to allow this appeal.

THE RESPONDENT COUNSEL'S SUBMISSIONS

[19] Counsel for the respondent on the other hand submitted that the learned High Court judge was right in arriving at the decision which she did.

[20] According to counsel, cl 11(b) of the subcontract and para 14 of the letter of award deals with the mode of payment for work in progress. He contended that the terms of the letter of award (including para 14), were superseded by the terms and conditions of the formal contract which must take precedence in the event of any inconsistency. Clause 2 of the subcontract states the 'Sub-contractor shall execute and complete the Sub-Contract Works subject to and in accordance with this Sub-Contract'. Counsel said that the intention of para 14 of the letter of award is to be found exclusively in cl 11(b).

[21] Counsel further contended that payment for work in progress is made in tandem with the level of progress of the work as certified by the architect. In this case the total value of the works executed upon termination was RM807,011.75. The value certified by the architect as having been completed by the plaintiff as at 6 March 1998 (Interim Certificate No 19) was RM794,441.13. No further certification was issued by the architect subsequently.

[22] Counsel submitted that the context in which cl 11(b) operates was not the same as that in which cl 19 is set and does not overlap. The amounts mentioned in cl 11(b) represented a few distinct debts each due under a different interim certificate of payment plus the retention sum, whereas cl 19 is to be applied in a scenario where termination of the sub-contractor is due to termination of the defendant's employment under the main contract. The amount in cl 19 was claimed as one entire debt due upon termination (inclusive of the sum which would otherwise have to remain as a retention sum). Counsel further submitted that the plaintiff in this latter situation was entitled to be paid the whole of the total value of works it has completed on the date of termination. The defendant was, in the circumstances of this case, in breach of cl 19. The respondent's counsel submitted that even if Sum Projects did not pay the defendant, the plaintiff was nevertheless entitled to payment in respect of the value of works completed under cl 19 upon termination by reason of the use of the peremptory word 'shall'. The plaintiff must be paid the whole of the works it has executed if there is to be an automatic discharge of the subcontract through no fault of its own.

[23] Counsel submitted that the High Court was on the facts of this case, right in applying the Court of Appeal's decision in *Antah Schindler*. A person to whom goods were supplied to and/or services rendered whether under a complete contract or quasi contract is ordinarily (unless otherwise exempted by clear agreement to the contrary) liable to pay for them.

DECISION

[24] The defendant is only appealing against the decision of the High Court in allowing the plaintiff's claim and not against the dismissal of the defendant's counterclaim.

[25] We are here concerned with a 'pay when paid' clause, also referred to as payment on a 'back to back basis'. A

[26] Parties appear to be on common ground that in certain cases it may be possible for persons contracting with each in respect of a building contract to include in their agreement clear and unambiguous conditions which have to be fulfilled before a subcontractor has the right to be paid. That if parties wish to regulate their liability to pay the party with whom they are in subcontract, and to prescribe that their liability arises only in so far as they themselves receive payment from the employer, they must do so by express agreement. Any such agreement would have to make it clear beyond doubt that the agreement was conditional and not merely governing the time for payment; to state expressly that there was a condition precedent to be fulfilled before the liability to pay arose. We agree that there is a distinction between clauses which impose a time requirement for payment, as opposed to a limitation on the right to be paid at all. The condition precedent must be spelt out in clear and precise terms in order to shift the risk to the subcontractor. B C D

[27] The inclusion of such a clause can be justified on the ground that the parties to a contract apportion the risk of non-payment by the employer between those who have earned the right to be paid. E

[28] What is the meaning to be accorded to the legal obligations each assumed by the contractual words they chose to express themselves in this case? We have considered the decision of the two Court of Appeal decisions referred to us which had taken a conflicting position very carefully in making a considered decision in this case. With respect, we are in agreement with the decision of the Court of Appeal in *Asiapools* and not that in *Antah Schindler*. F G

[29] We are of the view that the clauses relied upon are clear and unambiguous. The duty of the court is to give effect to the clear intention of the parties expressed in cl 11(b). Our reading of the words used in cl 11(b) of the sub-contract is that cl 11(b) does more than identify the time at which certain things are required to be done. We are of the view that cl 11(b) falls within the 'if' category, to prevent a subcontractor who has done the work from being paid by reason of the party with whom he has contracted has not been paid by someone higher up the chain. That it contemplates the actual receipt by the main contractor of the sum certified. Payment from the owner was a condition precedent to the main contractor's obligation to make payment to a subcontractor. H I

[30] For the above reasons the appeal was allowed. The decision of the High

A Court in allowing the plaintiff's claim was set aside with costs of RM2,500 to the appellant. The deposit to the appellant.

Appeal allowed with costs of RM2,500.

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Reported by Kohila Nesan

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